No. 82-990

In the Supreme Court of the United States

OCTOBER TERM, 1982

DR. JACK L. MARVIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erroneously instructed the jury regarding the requirement of intent for aiding and abetting a violation of 7 U.S.C. (Supp. V) 2024(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-33a) is reported at 687 F.2d 1221. The post-trial order of the district court (Pet. App. 34a-55a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1982 (Pet. App. 2a). An order denying rehearing (Pet. App. 1a) was entered on October 14, 1982. The petition for a writ of certiorari was filed on December 13, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted on one count of illegally acquiring and possessing food stamp coupons in violation of 7 U.S.C. (Supp. V) 2024(b),

and on two counts of aiding and abetting the illegal acquisition of food stamp coupons in violation of 7 U.S.C. (Supp. V) 2024(b) and 18 U.S.C. 2.[1] He was sentenced to concurrent terms of one year's imprisonment with all but 90 days suspended, to be followed by two years' probation, and he was fined $5000 on the first count. The court of appeals reversed the conviction on the first count, but affirmed the convictions on both of the aiding and abetting counts (Pet. App. 2a-33a).

1. The evidence as reflected in the opinion of the court of appeals showed as follows. Petitioner is a chiropractor in Kansas City, Missouri (Pet. App. 4a). In March 1980, petitioner was approached by Jackie Clark, an undercover investigator for the Department of Agriculture and a personal acquaintance of petitioner's. At that time, Clark invited petitioner to purchase food stamp coupons for substantially less than their face value (*id.* at 4a-5a).

On March 10, 1980, Clark took $500 worth of food stamps supplied to him by investigators at the Department of Agriculture into petitioner's office and returned with $200 in cash. Clark indicated that petitioner purchased those stamps himself directly from Clark (Pet. App. 5a). On April 9 and May 22, 1980, Clark again took food stamps to petitioner's office, but on those occasions petitioner merely helped arrange a sale of food stamps to co-defendant Anthony Astorino.[2] Petitioner provided cash for both purchases. Department of Agriculture agents taped both of those transactions (Pet. App. 6a).

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[1]Petitioner was acquitted on a fourth count of aiding and abetting under 7 U.S.C. (Supp. V) 2024(b) and 18 U.S.C. 2.

[2]Astorino was tried separately and convicted.

The district court instructed the jury that in order to convict petitioner on the substantive count of violating 7 U.S.C. (Supp. V) 2024(b),[3] it was required to find that petitioner's possession of the food stamps was done "knowingly" *i.e.*, "voluntarily and intentionally," and thus was not a mistake. The district court declined, however, to instruct the jury that it had to find that petitioner specifically intended to violate the law. With regard to the aiding and abetting counts, however, the court instructed the jury that it had to find that petitioner "willfully" participated in a crime, which it defined to mean "done voluntarily and intentionally, and with specific intent to do something the law forbids * * *" (Tr. 453).

2. The court of appeals affirmed in part and reversed in part (Pet. App. 2a-33a). It held that the district court erred in refusing to instruct the jury that 7 U.S.C. (Supp. V) 2024(b) is a specific intent crime and therefore reversed the conviction on the first count (Pet. App. 8a-19a).[4] The court held, however, that the jury had been given a proper specific intent instruction with regard to aiding and abetting the violation of Section 2024(b), and that there was ample evidence to support the jury's verdict on those two counts (Pet. App. 19a-20a).

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[3] 7 U.S.C. (Supp. V) 2024(b) provides in pertinent part:

> [W]hoever knowingly uses, transfers, acquires * * * or possesses [food stamp] coupons * * * in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall, if such coupons are of a value of $100 or more, be guilty of a felony.

[4] The court of appeals made clear that it was not holding that the evidence was insufficient to prove that petitioner had specific intent to violate 7 U.S.C. (Supp. V) 2024(b), and indeed noted that such intent could be readily inferred from the purchase of stamps "at a deep discount" as occurred in this case (Pet. App. 18a).

ARGUMENT

1. Petitioner contends (Pet. 8-18) that he was not properly convicted of aiding and abetting Astorino's acquisition of food stamps because the jury was not instructed that Astorino was required to have intended specifically to violate the law when he purchased the stamps. Further, he argues that the court of appeals erred in holding that the district court's instruction requiring the jury to find that petitioner had specific intent in order to convict him of aiding and abetting was sufficient.

The decision below does not conflict with any holdings of this Court or any other court of appeals, and the court's opinion does not discuss the issue raised by petitioner and thus is no precedent on this issue. Accordingly, the decision of the court of appeals is not a proper vehicle for deciding whether the failure to instruct regarding the specific intent of the principal is a bar to a conviction for aiding and abetting.

Petitioner claims (Pet. 12-13) that the decision below conflicts with this Court's decisions in *Standefer* v. *United States*, 447 U.S. 10 (1980) and *Shuttlesworth* v. *Birmingham*, 373 U.S. 262 (1963). Neither case, however, decided the issue he raises. In *Standefer* the Court, in affirming a conviction under Section 2 of 18 U.S.C., did point out that the government had proved beyond a reasonable doubt that the principal in that case had violated 26 U.S.C. 7214(a)(2). 447 U.S. at 26.[5] But the Court in discussing the jury instructions had no occasion to consider what instructions regarding the principal's intent were required in order to convict for aiding and abetting. See *id.* at 13 n.6.

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[5]Here too, the evidence amply supported the principal's guilt, and indeed he was convicted at a separate trial.

In *Shuttlesworth*, the Court held that there could be no aiding and abetting of an innocent act, but it did so in the context of a prior holding that the statute under which the principal had been convicted violated the First Amendment. Accordingly, the act in that case was plainly innocent; here there was ample evidence from which to conclude that the principal violated 7 U.S.C. (Supp. V) 2024(b). Thus, nothing in *Shuttlesworth* controls the result in this case.

Petitioner also asserts (Pet. 14-16) a conflict between the decision below and *United States* v. *Tashjian*, 660 F.2d 829 (1st Cir.), cert. denied, 454 U.S. 1102 (1981), and *United States* v. *Cleary*, 565 F.2d 43 (2d Cir. 1977). Both of those cases, however, involved a very different factual setting. In each case the court found that there was absolutely no evidence from which the requisite intent of the principal could be inferred and thus, following this Court's decision in *Shuttlesworth*, those courts held that a defendant cannot be convicted of aiding and abetting an innocent act. Neither court dealt with the issue of whether a specific intent instruction for the principal is required where the jury is instructed that it must find that the aider and abettor had guilty intent. Accordingly, there is no conflict with those decisions. Since the decision below is vague and concerns a situation unlike that presented in any cases cited by petitioner, and the situation here is not likely to recur,[6] it does not warrant further review by this Court.

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[6]It is largely fortuitous that there is even an issue of the principal's intent in this case. It is settled that under 18 U.S.C. 2(b), which includes within the term aiding and abetting acts done by one who willfully causes another to commit a crime, the principal need not have criminal intent. See *United States* v. *Ruffin*, 613 F.2d 408, 413 (2d Cir. 1979); *United States* v. *Gleason*, 616 F.2d 2, 20 (2d Cir. 1979), cert. denied, 444 U.S. 1082 (1980); *United States* v. *Rucker*, 586 F.2d 899, 905 (2d Cir. 1978); *United States* v. *Rapoport*, 545 F.2d 802, 806 (2d Cir. 1976), cert. denied, 430 U.S. 931 (1977); *United States* v. *Kelner*, 534 F.2d

2. Petitioner next claims (Pet. 18-24) that there was an ambiguity in the instructions on aiding and abetting in respect to specific intent. This contention proceeds from two premises. First, petitioner points out (Pet. 21) that the instructions did not require the jury to find specific intent with respect to the Count One charge. Second, he notes (Pet. 22) that the district court opened its discussion of aiding and abetting by instructing that participation in an offense is willful if "done voluntarily and intentionally" (Tr. 453), which was the same language used in the instruction on the substantive offense. From this, he concludes that the jury would logically have believed that the scienter elements of the two offenses were the same and that a finding of knowledge of illegality was not required for either.

The district court, however, fully defined the willfulness element of aiding and abetting by instructing that an act is done willfully if done "with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law" (Tr. 453). The jury was thus clearly informed that the scienter element of aiding and abetting included knowledge of illegality. If there was any potential for confusion in the instruction, the jury would have been just as likely to have believed that knowledge of illegality was an element of the Count One offense as well as of the aiding and abetting offenses. In any event, the court expressly instructed the jury that each count involves "[a]

1020, 1022 (2d Cir.), cert. denied, 429 U.S. 1022 (1976); *United States* v. *Bryan*, 483 F.2d 88, 92-94 (3d Cir. 1973); *United States* v. *Lester*, 363 F.2d 68, 72-73 (6th Cir. 1966), cert. denied, 385 U.S. 1002 (1967). As the court explained in *Lester*, the willfulness of a causer is joined with the act of an innocent intermediary to form, in respect to the causer, the "joint operation of act, or failure to act, and intent" prerequisite to the commission of a crime. 363 F.2d at 73. Thus, in most cases where this problem arises and the aider and abettor has specific intent, the issue can be avoided simply by instructing under Section 2(b).

separate crime or offense" and that "[e]ach charge * * * should be considered separately" (Tr. 448). Accordingly, it is most unlikely that the jury confused the two sets of instructions.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1983

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[7]Petitioner also claims (Pet. 25) that the jury could have believed that he was charged in the second and third counts as a principal (and hence was subject to a lesser scienter requirement) because the district court instructed that he was "charged in four counts of violations of 7 U.S.C. 2024(b)" (Tr. 449-450). Earlier, however, the court had read each of the four counts to the jury, including the statutory citations (Tr. 445-447). The first count charged petitioner alone, and the remaining three counts charged petitioner together with Astorino, and cited 18 U.S.C. 2. In light of the court's extended discussion of aiding and abetting and the fact that the proof unambiguously showed that the person who actually received the stamps charged in the second and third counts was Astorino and not petitioner, the court of appeals correctly held that "it is clear in context that [petitioner] was not charged in these two counts with acquiring or possessing food stamps himself, but rather with helping someone else to do so" (Pet. App. 19a).

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